No. 88-6546

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO, PETITIONER

v.

EDWARD REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribe has jurisdiction to prosecute Indians who are members of another tribe for offenses committed on the tribal reservation.

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INTEREST OF THE UNITED STATES

The United States has a statutory responsibility for law enforcement on Indian reservations under 18 U.S.C. 1151-1153. That statutory responsibility is complementary to the tribal law enforcement authority, the scope of which is at issue in this case. In addition, by virtue of its trust responsibility to the Indians as well as its responsibility to protect the civil rights of all its citizens, the United States has an interest in assuring that law enforcement by the tribes themselves is both fair to all defendants and effective in assuring an orderly and peaceful reservation.

STATEMENT

1. Petitioner is an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians, and has lived a large portion of his life off-reservation, apparently in California (Pet. App. B 1138). Between March and

June, 1984, he lived with a woman friend, a member of the Salt River Pima-Maricopa Indian Community (the Community), on that Tribe's reservation in Arizona.[1] During this time, he also worked for the PiCopa Construction Company, which is owned by the Community (*ibid.*).

On June 18, 1984, a complaint was filed in federal court charging petitioner with murder and aiding and abetting murder, in violation of 18 U.S.C. 2, 1111 and 1153. On that same date, he was charged in the tribal court of the Salt River Reservation with discharging a firearm on the reservation, in violation of the Salt River Community's Code of Misdemeanors. In both cases, it was alleged that petitioner shot and killed a fourteen-year-old boy within the boundaries of the reservation. The victim was an enrolled member of the Gila River Indian Tribe of Arizona, which resides on a separate reservation. Pet. App. B 1138.

Federal agents arrested petitioner. Although he was indicted in federal court for first degree murder, that indictment was later dismissed without prejudice on the motion of the government. Petitioner was then placed in the custody of the tribal Community Department of Public Safety. Pet. App. B 1138-1139.

He petitioned the United States District Court for the District of Arizona for a writ of habeas corpus, which that court granted. Pet. App. D 1-6. The district court relied on the Indian Civil Rights Act of 1968, specifically 25 U.S.C. 1302(8), which states that an Indian tribe exercising powers of self-government may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The court found that the Community's code of ordinances provides for criminal jurisdiction over any nonmember, but that such jurisdiction is asserted only over nonmember Indians.[2] The court ruled that the Community's enforcement policy was not justified "under either the rational basis or strict scrutiny standards," and that the assertion of criminal jurisdiction over petitioner therefore violated 25 U.S.C. 1302 (8). Pet. App. D 5.

[1] Both the Torres-Martinez Band and the Salt River Pima-Maricopa Indian Community are federally recognized Indian tribes. See 53 Fed. Reg. 52,829, 52,831, 52,832 (1988).

The court of appeals reversed, with Judge Sneed dissenting (Pet. App. B).[3] The court first noted that in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court held that tribes lack criminal jurisdiction over non-Indians. The Ninth Circuit observed that that opinion referred only to non-Indians, as some subsequent opinions of this Court have recognized (*National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845-853 (1985); *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153 (1980)), although others have more generally characterized *Oliphant* as applying to nonmembers of the tribe (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 171-173 (1982) (Stevens, J., dissenting); *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978)). The court concluded, Pet. App. B 1140-1141, that this Court "has not used the terms non-Indian and nonmember Indian precisely," and that the holdings in the opinions cited above do not depend on making that distinction with regard to *Oliphant*. *Id.* at 1139-1141.

The court then analyzed *Oliphant* itself, explaining that it was based on an historical shared presumption that Indian tribes lack jurisdiction over non-Indians. The court found that no such presumption exists regarding nonmember Indians, and that there is some indication of the opposite understanding—that tribes have jurisdiction over nonmember Indians. Pet. App. B 1141.

[2] Under *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), Indian tribes lack criminal jurisdiction over non-Indians in the absence of an express delegation by Congress.

[3] The court's opinion was a substantial revision of a July 9, 1987, opinion by the panel, to which Judge Sneed had also filed a dissent (Pet. App. C).

The court also found in the pattern of federal criminal law set out in 18 U.S.C. 1151-1153 an indication that tribes have criminal jurisdiction over nonmember Indians. Under those statutes, the federal courts have criminal jurisdiction over crimes by or against "Indians" in Indian country, except for "offenses committed by one Indian against the person or property of another Indian," crimes already punished by the local law of the tribe, or where treaties place jurisdiction exclusively in a tribe (18 U.S.C. 1152); federal courts also have jurisdiction over certain specified major offenses committed by one Indian against the person or property of another Indian (18 U.S.C. 1153). The court found in these statutes an understanding that, regardless of the defendant's or victim's particular tribal membership, most crimes by one Indian against another were to be prosecuted in tribal court, while the identified major crimes would go to federal court. It concluded that "if Congress had intended to divest tribal courts of [general] criminal jurisdiction over nonmember Indians they would have done so," and that, in the absence of congressional action, tribes retain that jurisdiction. Pet. App. B 1141-1143.

Finally, the court rejected the argument that the Tribe's assertion of jurisdiction over petitioner violated equal protection principles as reflected in the Indian Civil Rights Act of 1968, 25 U.S.C. 1302. Citing *United States* v. *Antelope*, 430 U.S. 641, 645 (1977), the court concluded that Indian status is a political rather than racial classification. The court also noted that petitioner was closely associated with the Community because of his relationship with his girlfriend, his residence with her family on the reservation, and his employment with the Community's PiCopa Construction Company. It concluded that these contacts justify the tribal court's jurisdiction over him, and emphasized that this was not "purely a racial determination." Pet. App. B 1144.

The court also ruled that allowing tribal court jurisdiction over member and nonmember Indians has a rational basis because of the inadequacy of federal and

state law enforcement resources for Indians on reservations, and because the existence of such jurisdiction could reasonably be thought to strengthen the tribal courts. The court therefore found no violation of equal protection principles. Pet. App. B 1145.

Finally, the court observed that if tribal courts lacked jurisdiction over most offenses committed by nonmember Indians on the reservation, there would be a jurisdictional void: under 18 U.S.C. 1152, the federal government lacks general criminal jurisdiction over crimes committed by one Indian against another Indian, and since state courts do not (and generally cannot) assert criminal jurisdiction over crimes by Indians on Indian reservations, a lack of tribal court jurisdiction would lead to *no* capacity to prosecute nonmember Indians for committing crimes not specifically identified in 18 U.S.C. 1153 against Indians on the reservation. Pet. App. B 1145-1146.

In his dissenting opinion (Pet. App. B 1146-1152), Judge Sneed concluded that retained tribal sovereignty exists only to govern the behavior of tribal members. While he found 18 U.S.C. 1152 to be consistent with tribal criminal jurisdiction over nonmember Indians, he reasoned that the federal statute does not require or grant that jurisdiction and therefore does not give a tribe powers greater than its retained sovereignty. Finally, Judge Sneed concluded that upholding tribal jurisdiction over nonmember Indians unjustifiably discriminates against those persons.[4]

The court of appeals denied rehearing en banc, with a dissent by Judge Kozinski, joined by two other judges. Pet. App. A. Judge Kozinski argued (as had Judge Sneed) that the court's holding was contrary to *Oliphant* and *Wheeler*; he also found it contrary to *Washington* v.

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[4] Judge Sneed would avoid the jurisdictional gap posited by the panel majority by treating the nonmember Indian as a non-Indian for the purposes of the Section 1152 exception from federal jurisdiction of offenses committed by one Indian against another, but as an Indian subject to federal jurisdiction under that Section. Pet. App. B 1151.

Confederated Tribes, 447 U.S. 134 (1980) and *Montana* v. *United States*, 450 U.S. 544 (1981).[5] Judge Kozinski asserted that allowing tribal courts criminal jurisdiction over nonmember Indians would be unjustifiable racial discrimination and therefore a violation of equal protection of the laws. He also took the view that such jurisdiction might unfairly subject individuals to biased tribal courts because of hostility between tribes. Pet. App. A 1468-1470.

SUMMARY OF ARGUMENT

This Court has repeatedly held that federal statutes dealing separately with Indians do not violate the Equal Protection or Due Process Clauses of the Constitution, but instead are based on the historical relationship between the Indian tribes and the federal government. See *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 552-554 (1974). This Court held in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes lack criminal jurisdiction over non-Indians because of the long historical understanding that such jurisdiction did not exist, and because the federal government by statute had assumed jurisdiction over crimes by non-Indians against Indians in Indian country. The same analysis leads to the opposite conclusion regarding tribal jurisdiction over offenses not covered by the Major Crimes Act committed by nonmember Indians against Indians in Indian country. That jurisdiction has always been retained by the tribes.

[5] The *Confederated Tribes* case had allowed an exemption from state tax on the sales of cigarettes between tribal members on a reservation, but expressly did not allow that exemption when the purchaser was a nonmember Indian, because such a tax on nonmember Indians would not impinge on tribal sovereignty (447 U.S. at 160-161). The *Montana* case concerned a tribe's rights to regulate hunting and fishing by non-Indians on non-Indian land within the boundaries of a reservation. This Court's opinion states that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. See Judge Kozinski's opinion, Pet. App. A 1466.

Under the earliest treaties with the Indians and the concurrent federal laws, the federal government asserted jurisdiction to punish citizens for certain specified offenses, and to protect citizens against certain offenses by Indians in Indian territory, but left all other offenses, whether committed by or against Indians, to be dealt with by the Indians in accordance with their traditional systems. Gradually, federal jurisdiction was extended, first to all offenses involving non-Indians, then, under the Major Crimes Act, to certain specified serious offenses even when committed by an Indian against the person or property of an Indian. Nevertheless, the original understanding that nonspecified offenses committed by Indians against Indians remain subject only to Indian tribal customs continues to be part of the current criminal justice system.

The evolution of the relationship between state and Indian criminal jurisdiction has followed a somewhat similar path. Originally, the State had absolutely no jurisdiction over offenses committed on a reservation within its boundaries. Although eventually state jurisdiction was recognized over offenses committed on the reservation that did not involve Indians either as perpetrators or victims, it remains true today that the State has no jurisdiction over on-reservation offenses involving Indians except pursuant to procedures established under Public Law 280 or similar statutes. In Public Law 280, Congress authorized any State that is ready to commit the resources necessary to maintain law and order in Indian country within its boundaries to assume criminal jurisdiction over such areas following completion of required statutory procedures, including (since 1968) Indian acceptance of state jurisdiction. Absent such express assumption of state jurisdiction,[6] the criminal jurisdiction that has not been assumed by the federal government remains with the tribe.

[6] Arizona has never assumed such jurisdiction.

Consideration of the relative interests involved confirms this conclusion. Reservations, which are often located in remote, sparsely settled areas, typically contain substantial populations of Indians who are not members of the "home tribe."[7] It is not realistic in such circumstances for the residents to rely on the limited availability of state and federal law enforcement resources for the maintenance of law and order on the reservation. This is particularly true since, unlike the situation in *Oliphant*, the absence of tribal jurisdiction would create the likelihood of a gap in criminal jurisdiction, placing certain offenses beyond any legal system. Unless the tribe has jurisdiction over offenses not within the Major Crimes Act committed on the reservation by a nonmember Indian against the person or property of an Indian, such offenses may not be punishable at all. That jurisdictional gap would seriously threaten the maintenance of law and order on the reservation; accordingly, the preservation of tribal jurisdiction here is imporant in order to maintain the tribe's right to the peaceful enjoyment of its territory, one of the rights inherent in its limited sovereignty.

The existence of tribal jurisdiction over nonmember Indians does not violate their rights. Although tribes are not subject to the limits imposed by the Constitution on the state and federal governments, they are subject to the Indian Civil Rights Act, which contains comparable equal protection and due process guarantees. The tribe does not violate those guarantees so long as it treats everyone subject to its jurisdiction alike, whether a tribal member or a non-member Indian, and provides for fair treatment. There is no claim here that petitioner, who has not yet been tried by the tribal court, has been treated unfairly by the tribal judicial system itself. Such claims can, in any event, be presented to a federal court through a writ of habeas corpus under the Indian Civil

[7] Indeed, in some parts of Indian country, there may not even be a "home tribe." See note 28, *infra*.

Rights Act. Nor does the fact that petitioner is subject to tribal jurisdiction because he is an enrolled member of an Indian tribe offend the federal Constitution, even though a non-Indian citizen would not be so subject. Distinctions based on such enrollment are not immutable racial classifications—tribal membership is voluntary, and if it is formally renounced, the individual is thereafter treated like any other non-Indian citizen for purposes of criminal jurisdiction. This Court has consistently recognized that distinctions based on tribal membership, like those reflected in the federal statutory plan, are appropriate in light of the unique relationship between the tribes and the federal government.

ARGUMENT

Article I, § 8, Cl. 3 of the Constitution empowers Congress to "regulate Commerce * * * with the Indian Tribes." The Court has long recognized that this clause, together with the unique historical relationship between the United States and the Indian tribes, authorizes Congress to enact laws specifically applicable to Indians. See, *e.g.*, *United States* v. *Kagama*, 118 U.S. 375 (1886); *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959); *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). In particular, legislation providing that enrolled members of Indian tribes shall be treated differently from citizens who are not tribal members does not reflect an impermissible racial classification. *Antelope*, 430 U.S. at 645-646; *Morton* v. *Mancari*, 417 U.S. 535, 552-554 (1974). Moreover, in the area of criminal law enforcement, the Court has specifically held that constitutional equal protection guarantees do not prohibit the treatment of Indian tribal members differently from non-Indians (*Antelope*, 430 U.S. at 647-650).

Of course, the fact that such a rule may be constitutionally permissible does not of itself indicate that a special rule or practice applies in the Indian context. For example, this Court concluded in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), that jurisdiction to

try non-Indians for offenses committed in Indian country is not part of the retained tribal sovereignty. It reached that conclusion on the basis of an analysis of the "treaties drawn and executed by the Executive Branch and legislation passed by Congress[,] * * * read in light of the common notions of the day and the assumptions of those who drafted them" (*Oliphant*, 435 U.S. at 206). A similar analysis leads to the conclusion that retained tribal sovereignty *does* include jurisdiction to try enrolled members of any Indian tribe who reside within the tribal court's jurisdiction.[8]

I. TRIBAL GOVERNMENTAL INSTRUMENTALITIES HAVE LONG BEEN RECOGNIZED AS RETAINING CRIMINAL JURISDICTION OVER OFFENSES COMMITTED BY ALL INDIANS AGAINST INDIANS IN INDIAN COUNTRY

Federal legislation has from the earliest enactments occupied the field of criminal jurisdiction involving Indians in Indian country, to the exclusion of state jurisdiction. Originally, Congress dealt only with specific crimes involving non-Indians as perpetrators or victims, and left crimes by Indians against Indians to be dealt with by the tribes. See *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). In the Act of Mar. 3, 1817, ch. 92, 23

[8] We submit that an appropriate test for determining whether a resident is an Indian for purposes of tribal court jurisdiction is whether the individual is an enrolled member of an Indian tribe. See *Antelope*, 430 U.S. at 646-647 n.7 (stating that enrolled tribal members are, by reason of enrollment, "not emancipated from tribal relations", and suggesting that enrollment is by itself enough to justify treating an individual as an Indian so that federal criminal jurisdiction attaches; leaving open question whether it is an absolute requirement). It is unnecessary in this case to determine whether other factors, either singly or in combination, would also serve to identify a resident as an Indian subject to tribal court jurisdiction, or whether tribal court jurisdiction would extend to non-resident Indians. Specifically, the Court need not consider whether the court below appropriately suggested a "totality of circumstances" test for determining Indian status for purposes of tribal court criminal jurisdiction. See Pet. App. B 1144.

Stat. 383, Congress adopted the criminal laws of the United States applicable in federal enclaves to the territory belonging to any Indian tribe, and expressly disclaimed jurisdiction over crimes committed in that territory by Indians against Indians. The statute specifically stated:

> That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary.

Section 25 of the Act of June 30, 1834, ch. 161, 4 Stat. 733, continued the exception for "crimes committed by one Indian against the person or property of another Indian." See *United States* v. *Wheeler*, 435 U.S. 313 (1978). Cf. Sections 3-5 of the Act of Mar. 27, 1854, ch. 26, 10 Stat. 270.[9]

When these statutes were passed, Congress made no distinctions based on tribal membership: the distinction was simply between Indians and non-Indians. Federal criminal jurisdiction extended to Indians whenever the crime involved a non-Indian, either as perpetrator or victim. Absent such involvement, Indian tribes retained criminal jurisdiction, within their boundaries, over Indians generally.[10] See H.R. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis in original):

[9] Section 3 of the 1854 Act further manifested the intention to leave crimes by Indians against Indians to tribal punishment. It added an exception from federal jurisdiction for crimes punished "by the local law of the tribe" and also restored the exception where exclusive jurisdiction was given to a tribe by treaty.

Sections 4 and 5 spelled out specific crimes: arson and assault with a deadly weapon. The crime of arson applied to a non-Indian no matter whose building was burned, but to Indians only if they set fire to property at least partially owned by a non-Indian. Likewise, the crime of assault applied to a non-Indian assaulting anyone, but to Indians only when they assaulted non-Indians.

[10] On pages 29-37 of his brief, petitioner cites a number of early Indian treaties which assert federal jurisdiction over crimes by

> It will be seen that we cannot, consistently with the provisions of some [of] our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits.

This Court early recognized that this reservation of tribal jurisdiction was not limited to members of the tribe possessing a particular piece of Indian country. It interpreted the Indian-against-Indian exception of Section 25 of the 1834 Act in *United States* v. *Rogers*, 45 U.S. (4 How.) 567 (1846), ruling that it applied to Indians as a class—without regard to tribe. "[The exception] does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs" (45 U.S. at 573).

Indians against "citizens of the United States" or by "citizens" against Indians. These treaties are simply further examples of the general assertion of federal criminal jurisdiction over crimes involving non-Indians, since there was no general grant of citizenship to Indians until 1924. Act of June 2, 1924, ch 233, 43 Stat. 253.

Although none of these treaties involve the Salt River Indian Community, petitioner argues (Br. 31-32) that since he is a citizen of the United States, these early treaty provisions indicate that the federal government, not the tribe, should have jurisdiction over him. But although petitioner is certainly a citizen, he is also indisputably an Indian (see p. 1, *supra*). There is no indication in the text or legislative history of the 1924 Act that the extension of citizenship to Indians was in any way intended to affect the longstanding and subsequently reenacted "Indian-against-Indian" exception to federal jurisdiction, which does not turn on citizenship.

Section 25 of the 1834 Act was re-enacted as Sections 2145 and 2146 of the Revised Statutes in 1875, continuing the exception from federal jurisdiction for crimes committed by Indians against the person or property of Indians.[11] This general statutory scheme, originating in 1817, has continued in effect to the present day, with one important modification resulting from this Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883). In that case, one Lower Brule Sioux Indian was convicted in federal court of murdering another Lower Brule Sioux Indian, within Indian country. Relying on the Indian-against-Indian exception, this Court ruled that the federal courts had no jurisdiction over the crime, and the murderer was released. See also *Crimes Committed by Indians*, 17 Op. Att'y Gen. 566 (1883);[12] Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 958-962 (1975).

In reaction to *Crow Dog*, Congress enacted Section 9 of the Act of Mar. 3, 1885, ch. 341, 23 Stat. 385, the Major Crimes Act. See *Keeble* v. *United States*, 412 U.S. 205, 209 (1973). That statute set out a list of seven crimes that could be prosecuted in federal court if committed by an Indian on an Indian reservation, whether or not the victim was an Indian.[13] This Court promptly

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[11] Congress omitted that exception when it first re-enacted Section 25 of the 1834 Act. This omission was remedied in the Act of Feb. 18, 1875, ch. 80, 18 Stat. 318, which added the omitted language with the intent of keeping the exception in force without interruption. *Ex parte Crow Dog*, 109 U.S. at 558-559.

[12] This opinion, authored by the Solicitor General and later approved by the Attorney General, considered the murder of an Arapaho Indian by a Creek Indian within the Pottawatomie Reservation in the Indian Territory. Citing *Rogers* (and anticipating *Crow Dog*), the Attorney General determined that the federal courts probably lacked jurisdiction over the crime, but indicated that the "concerned" tribes, if they had an appropriate law "substantially conformable to natural justice," would have jurisdiction to try the defendant, 17 Op. Att'y Gen. at 570.

[13] The crimes were murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. Congress has since

upheld the validity of the Act in *United States* v. *Kagama*, 118 U.S. 375 (1886). As in *Rogers*, the Court made clear that the term "Indian" meant simply a member of some tribe, not necessarily of the tribe occupying the reservation where the crime occurred (118 U.S. at 383).

The statutes regarding criminal jurisdiction over Indians were re-enacted in 1909 and 1932, and consolidated in the Act of June 25, 1948, ch. 645, 62 Stat. 757, codified at 18 U.S.C. 1151-1153. *United States* v. *John*, 437 U.S. 634, 647, n.16 (1978). This recodification includes the Major Crimes Act (codified at 18 U.S.C. 1153) and Section 25 of the 1834 Act (codified at 18 U.S.C. 1152); it employs the words of the original provisions with only minor changes.[14]

This Court, and other courts, have held that in 18 U.S.C. 1151-1153 the term "Indian" includes any Indian in Indian country, regardless of particular tribal membership. *Kagama*, 118 U.S. at 383; *United States* v. *Dodge*, 538 F.2d 770, 785-787 (8th Cir. 1976) (conviction of nonmembers under Major Crimes Act); *United States* v. *Burland*, 441 F.2d 1199 (9th Cir.), cert. denied, 404 U.S. 842 (1971) (conviction of nonmember Indian

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added other crimes to the list; the modern version is codified at 18 U.S.C. 1153.

The 1885 statute differentiated between Indian reservations located in a territory of the United States and those located in a State. In the first situation, the Indian would be prosecuted in the territorial courts. In the second, he would be prosecuted in the courts of the United States. See *Kagama*, 118 U.S. at 377. Congress later amended the statute to eliminate the territorial court provision, and then extended its applicability from Indian reservations to "Indian country." *United States* v. *John*, 437 U.S. 634, 647 n.16 (1978).

[14] One change of significance occurred in the 1948 recodification. The statutes have always been applicable throughout "Indian country." That term had originally been defined to include the Indian territory generally, a definition that was deleted in the Revised Statutes; it was defined anew in the 1948 recodification. See *John*, 437 U.S. at 649 n.18. The new definition includes all land within the boundaries of Indian reservations, "dependent Indian communities," and Indian allotments. 18 U.S.C. 1151.

under 18 U.S.C. 1152). Cf. *State* v. *Allan*, 100 Idaho 918, 607 P.2d 426, 429 (1980) (State lacks jurisdiction over bribery committed by Quinault Indian on Coeur d'Alene Reservation); *Application of Monroe*, 55 Wash. 2d 107, 346 P.2d 667 (1959) (federal jurisdiction is exclusive over crime of aiding and abetting grand larceny committed by Blackfeet Indian on Yakima Reservation).[15]

A similar analysis of the historical materials discloses that Congress has consistently operated on the premise that, absent congressional action, the States have no jurisdiction over offenses involving Indians in Indian country.[16] This Court has agreed,[17] as have the state courts.[18]

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[15] Nothing in these decisions supports the suggestion in dissent (see Pet. App. B 1151) that 18 U.S.C. 1152 should be interpreted to use "Indian" to mean "any Indian" for purposes of federal jurisdiction, but to mean only "same tribe member Indian" for the Indian-against-Indian exception from federal jurisdiction.

[16] Although originally state law did not run at all within the lands reserved to the Indians (see, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. 515, 561 (1832)), this Court eventually made clear that crimes in Indian country that did not involve Indians were to be prosecuted in state courts. *United States* v. *McBratney*, 104 U.S. 621 (1882); *Draper* v. *United States*, 164 U.S. 240 (1896).

[17] See *United States* v. *John*, 437 U.S. at 651; *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962); *Williams* v. *Lee*, 358 U.S. at 220 n.5; *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Donnelly* v. *United States*, 228 U.S. 243, 270-272 (1913). As the Court explained in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979):

> [S]tate law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." * * * As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws * * * except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply."

[18] See, *e.g.*, *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct. App.

The major congressional action enabling the States to exercise such jurisdiction is "Public Law 280," the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.[19] This statute granted to certain named States criminal jurisdiction over Indians in Indian country within those States, and authorized other States to acquire that jurisdiction through state legislation.[20] As this Court explained in *Bryan* v. *Itasca County*, 426 U.S. 373,

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1988), review denied (July 2, 1988), cert. denied, No. 88-603 (June 26, 1989).

[19] The statute was enacted on the usual premise—that the States have no jurisdiction over Indians in Indian country in the absence of a federal statute expressly granting it. See *Bryan* v. *Itasca County*, 426 U.S. at 376 n.2, 379-380 (quoting from H.R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953)).

More recent federal statutes also acknowledge the lack of state jurisdiction over Indians in Indian country. Thus, Section 1009 of the Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2141, added the offenses of "maiming" and "involuntary sodomy" to those listed in the Major Crimes Act in order to allow the crimes to be prosecuted in federal court as felonies, because otherwise a crime by an Indian against an Indian could be prosecuted only in tribal court. See H.R. Rep. No. 1030, 98th Cong., 2d Sess. 3498 (1984). At the same time, Congress deleted petty larceny from the Major Crimes Act because it "is unnecessary and virtually never asserted in light of tribal court jurisdiction over this offense." H.R. Rep. No. 1030, *supra*, at 3499. See also Act of May 15, 1986, Pub. L. No. 99-303, 100 Stat. 438 (adding offense of sexual molestation of a minor to the offenses of the Major Crimes Act, because otherwise "only the tribe has jurisdiction to punish the offense" H.R. Rep. No. 528, 99th Cong., 2d Sess. 5 (1986)).

[20] The Act is discussed in *Williams* v. *Lee*, 358 U.S. at 220-221:

> Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* has denied [citing Public Law 280 and other statutes.]

379 (1976), congressional concern over the inadequacy of criminal law enforcement on Indian reservations was a major motivation for the enactment of Public Law 280. Congress also recognized that although the States specifically identified in Public Law 280 sought to extend their criminal jurisdiction to Indian country, many other States lacked the resources to provide for effective law enforcement in Indian country.[21] Accordingly, rather than making an outright grant of jurisdiction to all States in which Indian country is located, Public Law 280 merely gave federal consent to the exercise of such jurisdiction, leaving it to each State to determine its own "ability and willingness to accept such responsibility." H.R. Rep. No. 848, 93d Cong., 1st Sess. 6 (1953); S. Rep. No. 699, 83d Cong. 1st Sess. 5 (1953).[22]

In Section 402(a) of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 79 (25 U.S.C. 1322(a)), Congress modified the 1953 Act to require the consent of the affected Indians to a State's assumption of jurisdic-

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[21] See H.R. Rep. No. 848, *supra*, at 6-8, referring to tribal concern over lack of state resources, and noting that several States were prepared to accept such jurisdiction only if they also received federal financial assistance to permit them to exercise it. S. Rep. No. 699, 83d Cong., 1st Sess. 5-7 (1953) is to the same effect. Since the State lacks authority to tax reservation Indians and their property (*Bryan* v. *Itasca County*, *supra*), it cannot finance its law enforcement efforts in that way.

[22] Congress also recognized that the Enabling Acts of certain States required those States to disclaim jurisdiction over Indians in Indian country. Public Law 280 granted permission to such States to amend their laws to remove that disclaimer, so that they could assert the previously disclaimed jurisdiction. See *Washington* v. *Yakima Indian Nation*, 439 U.S. at 478-493; Goldberg, *Public Law 280: the Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 570 (1975) ("the disclaimers are more than protection against Indian loss of real property interests; they are congressional insulation against state jurisdiction over reservation Indians").

Arizona has such a disclaimer in its constitution, and has not accepted criminal jurisdiction over Indian country pursuant to Public Law 280. See *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 167 (1973); *Williams* v. *Lee*, 358 U.S. at 222-223, n.10.

tion.[23] Significantly, that consent must be "manifested by majority vote of the enrolled Indians [*not* just members of the "home tribe"] within the affected area of Indian country." [24]

In short, the history of federal dealings with Indians in Indian country demonstrates that although Congress has authorized prosecution in the federal courts of major crimes committed by Indians against Indians in Indian country, it has at the same time consistently recognized and preserved the pre-existing tribal authority to prosecute offenses not enumerated in the Major Crimes Act committed in Indian country by one Indian against the person or property of another. See *Donnelly* v. *United States*, 228 U.S. at 270-272; *United States* v. *Wheeler*, 435 U.S. at 322-323. That preserved tribal authority has not been limited to the situation in which the offender is a member of the sanctioning tribe. Moreover, it has been consistently recognized that congressional action is necessary to give a State jurisdiction over any offenses in Indian country by or against Indians. Congress has consented to the exercise of that jurisdiction only when a State has indicated that it is able and willing to accept the responsibility it entails—as Arizona has not [25]—and the affected Indians have agreed. Unless both entities are satisfied that the State can adequately maintain law and order on the reservation, the primary responsibility for doing so is to remain with the tribal courts, subject only

[23] Although the 1953 Act contained no express consent requirement, it did except certain tribes from its jurisdictional grant to the named States. The excepted tribes had opposed being subjected to state jurisdiction because, inter alia, of expressed fears that the State lacked the resources to provide for adequate law enforcement or that Indians would not be treated fairly in state courts. S. Rep. No. 699, *supra*, at 6-7.

[24] The statute also allowed a State that had acquired jurisdiction previously under Public Law 280 to retrocede that jurisdiction to the United States. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 428-429 (1971).

[25] See note 19, *supra*.

to the limited supplementary jurisdiction of the federal and state governments described above.

II. THE TRIBAL COURT HAS THE PRIMARY INTEREST IN EXERCISING THIS JURISDICTION

Along with the consistent historical practice we have recounted, a balancing of the pertinent interests involved also points to the existence of tribal authority in cases such as this.[26]

Although a reservation may be identified as the home of a particular tribe or tribes, it typically will contain a substantial number of resident Indians belonging to other tribes. For example, 181, or 8%, of the tribally-enrolled Indians resident on the reservation involved here, the Salt River Pima-Maricopa Reservation, are enrolled members of tribes other than the Pima or Maricopa Tribes. 2 Bureau of the Census, U.S. Dep't of Commerce, *1980 Census of Population*, Table 4, pt. 2, at 27 (1986) [hereinafter *1980 Census*].[27] Many of these persons undoubt-

[26] In the context of Indian affairs, this Court has frequently analyzed and balanced the relevant interests involved (usually for purposes of preemption analysis), with particular deference to "traditional notions of [tribal] sovereignty and * * * the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 (1980). See, *e.g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832 (1982); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216-218 (1987); *Cotton Petroleum Corp.* v. *New Mexico*, 109 S. Ct. 1698, 1707 (1989).

[27] Table 4 provides enrollment data for 201 of 278 listed tribes. Our analysis of these data indicates that at least 24,450 enrolled Indians live on reservations of tribes other than those in which they are enrolled. Based on those data and on information provided by the Department of the Interior, we note that the percentage of nonmember residents varies greatly from reservation to reservation. Although no resident members of enrolled tribes other than the "home tribe" are reported for three reservations, nine others have populations in which more than 40% of the enrolled residents are members of tribes other than the "home tribe". One quarter of the reservations with reported enrollment figures, *i.e.* 50 reservations, show more than 18% of their enrolled tribe residents are

edly have significant, long-term associations with the "home tribe" and the reservation, for example as spouses and children of tribe members—a matter of particular significance to traditional tribal court jurisdiction over offenses involving domestic violence. In addition, there is a substantial amount of intertribal visiting, especially at annual pow-wows. See S. Levine & N. Lurie, *The American Indian Today* 121 (1968); M. Wax, *Indian Americans: Unity and Diversity* 148-151 (1971). Thus, even if a reservation is identified with a particular "home tribe," members of other tribes are likely to constitute a significant fraction of its residents or possible offenders.[28]

The existence of this substantial nonmember Indian population is important for two reasons. First, Indian country is often located in remote and sparsely populated areas.[29] In such areas, state law enforcement capacity is

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members of tribes other than the "home tribe". Although the Navajo reservation, which is by far the largest one, has a very low percentage—2%—of nonmember enrolled Indian residents, that percentage represents 1,920 persons. Overall, of the reservations for which enrollment figures are given, the average percentage of nonmember resident Indians is about 14%; fully one half of all tribes have 10% or more of nonmember resident Indians.

[28] The other categories of "Indian country"—dependent Indian communities and allotments (see note 14, *supra*)—may not even have a "home tribe." The term "dependent Indian community" is derived from *United States* v. *McGowan*, 302 U.S. 535 (1938), where the Court held that the Reno Indian Colony was Indian country for the purposes of federal laws forbidding the bringing of liquor into Indian country. That community consisted of 28.38 acres of land bought by the federal government in 1917 and 1926 and occupied by several hundred Indians previously scattered throughout Nevada. See *United States* v. *John*, 437 U.S. at 648.

Similarly, allotments are tracts of land held by the United States in trust for individual Indians. See *United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980). The provision concerning allotments, 18 U.S.C. 1151(c), comes into force only when an allotment is not within the boundaries of an Indian reservation, since it otherwise would be included under Section 1151(a).

[29] See Bureau of the Indian Affairs, U.S. Dep't of the Interior *Indian Land Areas*, Map (1971); *Report on Federal, State, and*

likely to be limited and unable to cope effectively with the added burdens that would be imposed if state jurisdiction were extended to cover non-major crimes committed by the substantial population of nonmember Indians.[30] Federal law enforcement capacity is also likely to be limited (see Report of the U.S. Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* 145 (GPO 1981)), and, in any event, devoted to controlling major crimes and crimes involving non-Indians.[31] The tribe, in contrast, has the primary interest in main-

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Tribal Jurisdiction, Task Force Four: Federal, State, and Tribal Jurisdiction 15-17 (Comm. Print 1976) (prepared for American Indian Policy Review Commission) [hereinafter *Task Force Report*]; cf. Bureau of the Census, U.S. Dep't of Commerce, *We, The First Americans* 13-14 (of housing units on reservations in 1980, 24% lacked complete plumbing facilities, 56% lacked a telephone, and 16% lacked electric lighting).

Of course, not all reservations are isolated. For example, the Port Madison Indian Reservation, the residence of the Suquamish Indian Tribe, respondent in *Oliphant*, is located on Puget Sound opposite Seattle; the Court's description of the reservation (435 U.S. at 191 & n.1) suggests that it is in many respects almost a suburb of Seattle. Although the Salt River Pima-Maricopa Indian Community involved here has a far greater Indian population than the Port Madison Reservation (see *1980 Census*, Table 4, pt. 2, at 25, 27), it is also quite close to an urban center—Phoenix, Arizona. *Indian Land Areas* Map, *supra*. Nevertheless, we suggest that the isolated Indian community is more the norm than the "suburban" one.

[30] In situations where the State is able to assume the added burdens and the tribe consents to that assumption, Congress has provided in Public Law 280 a means for the transfer of the authority to the State.

[31] Of course, in light of *Oliphant*, federal authorities must assume the general law enforcement responsibility where the offense is committed by a non-Indian against an Indian. That does not, however, mean that federal courts and prosecutors are best suited to the job (see *Oliphant*, 435 U.S. at 212; *Task Force Report* 37-38), or that federal jurisdiction should be extended, despite the direct statutory prohibition in 18 U.S.C. 1152, to cover all offenses committed by one Indian against another.

taining law and order within its domain, and reliance upon the tribal courts to do so furthers the federal interest in strengthening and improving tribal self-government. See *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 143-144; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978).[32]

Moreover, in light of the historical evidence that the federal government has never asserted jurisdiction, outside the Major Crimes Act, over crimes by Indians against the person or property of other Indians in Indian country, and that state jurisdiction over such crimes does not exist, there is no assurance that non-major offenses by nonmember Indians against other Indians are presently subject to *any* legal sanctions if they cannot be prosecuted by the tribe.[33] This possible jurisdictional gap distin-

[32] In recognition of the impracticality of relying solely on federal or state law enforcement, the Department of the Interior has, by regulation, established "courts of Indian offenses" on certain reservations. 25 C.F.R. Pt. 11. These courts are designed to provide "adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law." 25 C.F.R. 11.1(b). They are, by regulation, given jurisdiction over crimes committed "by any Indian, within the reservation or reservations for which the court is established." 25 C.F.R. 11.2(h).

The courts of Indian offenses were first established in 1883, pursuant to the general authority of Rev. Stat. §§ 463 and 465, now codified at 25 U.S.C. 2 and 9, and have continued to exist on some reservations to the present day. See *United States* v. *Clapox*, 35 Fed. 575 (D. Ore. 1888); F. Cohen, *Handbook of Federal Indian Law* 333-335 (1982). These courts have not been expressly authorized by Congress, but Congress has recognized their existence for more than 100 years. See, *e.g.*, Section 301 of the Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 78 (25 U.S.C. 1311) (directing the Secretary of the Interior "to recommend to the Congress * * * a model code to govern the administration of justice by courts of Indian offenses on Indian reservations"). This Court has also acknowledged the existence of these courts. *Williams* v. *Lee*, 358 U.S. at 222; *Wheeler*, 435 U.S. at 327; *Oliphant*, 435 U.S. at 196.

[33] There is also the related possibility that federal prosecutors may be motivated to avoid the gap by overcharging—bringing

guishes this case from the situation in *Oliphant*, where the absence of tribal jurisdiction over nonIndians simply meant that their offenses, if committed against Indians were subject to federal law, or if committed against non-Indians to state law. In contrast, here the lack of any clear alternative jurisdiction means that the absence of tribal authority to try nonmember Indian offenses would seriously threaten the maintenance of law and order on the reservation, and thus the health and welfare of all residents who would suffer from lawlessness on the reservation.[34] Cf. *Brendale* v. *Confederated Tribes & Bands of Yakima*, 109 S. Ct. 2994, 2997, 3007, 3014 (1989) (recognizing that under *Montana* v. *United States*, 450 U.S. 544, 566 (1981), tribal retained sovereignty includes power to exercise civil authority over non-Indians to restrain conduct that "threatens or has some direct effect on the [tribe's] * * * health or welfare").[35]

charges under the Major Crimes Act for conduct that would normally be prosecuted under statutes with less severe penalties.

[34] It is of course possible for Congress to fill the jurisdictional gap by expressly delegating to the tribal courts jurisdiction over non-major crimes committed by members of other tribes; it is our submission that it is unnecessary for it to do so, since this jurisdiction has never been removed. It is therefore unnecessary to subject the residents of Indian country to the serious dislocations in law and order that could be anticipated in the interim between a decision that the jurisdiction does not exist and the restoration of a comprehensive system of criminal law enforcement.

Moreover, the express delegation procedure might arguably mean that tribal courts would be considered an "arm of the Federal Government" for double jeopardy purposes (see *United States* v. *Wheeler*, 435 U.S. at 328). Tribal prosecution for a lesser included offense could thus bar subsequent federal prosecution under the Major Crimes Act, and "important federal interests in the prosecution of major offenders on Indian reservations would be frustrated" (*id.* at 331 (footnotes omitted)).

[35] Alternatively, it could be argued that the tribe retains, as an inherent aspect of its limited sovereignty, the right to condition the entry of Indians into its territory on their compliance with the tribal criminal laws, since—in order to avoid the jurisdictional gap —that condition is essential to the preservation of the tribe's

It is true that in *Wheeler*, 435 U.S. at 326, the Court observed, in rejecting the double jeopardy claim of a tribe member who had previously been convicted of a lesser included offense by the tribe, that Indian tribes have been divested of sovereignty in matters involving the relations between the tribe and nonmembers of the tribe, in contrast to "the powers of self-government, including the power to prescribe and enforce internal criminal laws, * * * [which] involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." See also *Montana* v. *United States*, 450 U.S. at 564 ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"). But neither *Wheeler* nor *Montana* involved a situation (1) in which Congress had consistently acted on the premise that the asserted tribal jurisdiction had not been divested, (2) the State had no jurisdiction, and (3) the possibility of a jurisdictional gap threatened essential interests in peace and security shared by the tribe members with all other residents of the community. We therefore submit that the dicta in those cases should not be extended to govern the decision here.

Finally, as this Court explained in *Kagama*, 118 U.S. at 384, the federal assertion of criminal jurisdiction in Indian country was designed to protect the Indians from their non-Indian neighbors, based on the fear that they would not be treated fairly in state courts. That risk of prejudice is based not on membership in any particular

peaceful enjoyment of its reservation. The Community need not and obviously cannot tolerate within its boundaries the presence of persons who are beyond the reach of any law for a substantial category of offenses. Subjecting non-Indians to that same condition is not essential, because they are subject either to state or federal law for their offenses. Cf. *Brendale* v. *Confederated Tribes*, 109 S. Ct. at 3009-3017 (opinion of Stevens, J., joined by O'Connor, J.) (relying for determination of tribal jurisdiction on existence of tribal power to exclude).

tribe, but simply on the individual's perceived "Indianness".

In enacting Public Law 280, Congress evidently concluded that the risk of prejudice had subsided so that States willing to devote the resources to extend their jurisdiction to Indian country should be permitted to do so. Nevertheless, the express exclusion of certain Indian country (see note 23, *supra*) and the amendment of the Public Law 280 procedures to require the affected Indians' consent to the assumption of state jurisdiction suggest that Congress also wished to leave to the Indian themselves the ultimate decision as to whether State authorities could be relied on to provide for fair and adequate enforcement authority on a particular reservation.[36] Arizona has not to date concluded that it is ready to accept Public Law 280 jurisdiction, and thus there has been no consent by the majority of the Indians affected to the assertion of such jurisdiction. Petitioner Duro's claims that it would be unfair to subject him to tribal court jurisdiction must accordingly be balanced against this history of reluctance to subject Indians to state court jurisdiction. To those claims we now turn.

III. APPLYING TRIBAL COURT JURISDICTION TO PETITIONER DOES NOT DEPRIVE HIM OF ANY CONSTITUTIONAL OR STATUTORY RIGHT

Petitioner contends that subjecting him to the jurisdiction of the tribal court of a tribe different from his own, in circumstances in which a similarly situated non-Indian would not be subject to that court's jurisdiction, denies him equal protection of the laws and due process.

Indian tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); see *Talton* v. *Mayes*, 163

[36] As recently as 1976, the *Task Force Report* stated at 15 as the "almost universal Indian viewpoint" that existing conditions continued to confirm the observation in *Kagama*, 118 U.S. at 384: "Because of the local ill feeling, of the people, States where [the Indian tribes] are found are often their deadliest enemies."

U.S. 376 (1896). Accordingly, in Section 2 of the Indian Civil Rights Act of 1968, 25 U.S.C. 1302, Congress enacted comparable standards to regulate tribal actions; 25 U.S.C. 1302(8) requires that no tribe shall "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The equal protection provision requires the tribal court to treat everyone *within its jurisdiction* equally; but it does not require the tribal court to treat one group within its jurisdiction like another group that is not. So long as the tribal court treats all Indians equally, it does not violate the Indian Civil Rights Act equal protection provision simply because its jurisdiction extends to Indians who are not tribe members but not to non-Indians. To the extent that a tribal court treats non-Indians differently than it does nonmember Indians, it does so only because the former are not within its jurisdiction under *Oliphant*. Petitioner, who has not yet been tried by the tribal court, does not claim that he has in fact been deprived of due process by the court's procedures. If he has such a claim at some point, he has a remedy for any violation of the requirements of basic fairness which Congress has imposed on the Indian tribes in 25 U.S.C. 1302 through a writ of habeas corpus in federal court under 25 U.S.C. 1303. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65-66 (1978).[37]

Accordingly, any equal protection or due process issues in this case arise under the Federal Constitution, not the Indian Civil Rights Act. Petitioner is treated differently

[37] There has been considerable criticism of the fairness of some tribal courts. See, *e.g.* S. Brakel, *American Indian Tribal Courts*, in *Indians and Criminal Justice* 147 (L. French ed. Allanheld, Osmun & Co. 1982); cf. *Greywater* v. *Joshua*, 846 F.2d 486, 488-489 (8th Cir. 1988). Moreover, Congress is considering a proposed amendment of the Indian Civil Rights Act of 1968 to provide for a right of action in federal court for individuals aggrieved by violations of the Act (S. 517, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S2186-S2192 (daily ed. Mar. 6, 1989).

for purposes of *federal* jurisdiction than a similarly situated nonIndian, simply because he is a member of an Indian tribe. That difference in treatment has not in fact prejudiced petitioner, who is charged with a violation of the tribal code of misdemeanors,[38] rather than the homicide with which he was originally charged in federal court. Pet. App. B 1138. Cf. *Antelope*, 430 U.S. at 644, where the application of federal law to an Indian resulted in harsher treatment than that accorded a nonIndian subject to state law.[39]

Petitioner is subject to tribal court jurisdiction not because he is an Indian by race, but because he is an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians. That membership is a sufficient indication of his self-identification as an Indian, with traditional Indian cultural values, to make it reasonable to subject him to the tribal court system, which within the limitations of fundamental fairness imposed by the Indian Civil Rights Act, implements traditional Indian values and customs. That identification carries with it benefits as well as burdens—because of it, petitioner is in many respects treated somewhat differently than non-Indians.[40] Moreover, petitioner's tribal identification is

[38] Sentences imposed by tribal courts may not exceed one year in jail and a fine of $5000. 25 U.S.C. 1302(7).

[39] The Court in *Antelope* emphasized that Antelope was treated the same as all citizens in federal enclaves, and thus "enjoy[ed] the same procedural benefits and privileges as all other persons within federal jurisdiction" (430 U.S. at 648). To the extent petitioner's claim is that he should not be excluded from federal court because he is an Indian, it is essentially the converse of the claim in *Antelope*. Nevertheless, as we explain below, the Court's analysis in *Antelope* of the rationale for distinctive treatment of Indians applies as well to petitioner's claim.

[40] For example, Indian Health Services benefits are available to all enrolled Indians, and their minor children, living within a service area—not just to members of the tribe located within that area. 42 C.F.R. 36.12(a). Similarly, contractors under the Indian Self-Determination and Education Assistance Act are required to give preferences for employment, training, and subcon-

voluntary, since he can at any time formally resign his membership in the tribe, and thenceforth be treated like any other nonIndian citizen. See *Antelope*, 430 U.S. at 646-647 n.7.

There is, of course, an ancestral element in the tribal identification; petitioner cannot become a member of the Pima-Maricopa Tribe. There is, however, nothing fundamentally unfair in subjecting him, in common with other resident Indians, to the jurisdiction of the tribal courts of that tribe, so long as those courts comply with the requirements of the Indian Civil Rights Act. Petitioner's position is not fundamentally different from that of the alien resident in a foreign country, who must comply with the foreign country's criminal laws and subject himself to the jurisdiction of its courts, even though he cannot participate in its political processes.[41]

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tracting to enrolled Indians generally, without regard to tribal membership. 25 U.S.C. 450b, 450e(b), 25 C.F.R. 271.444. With respect to certain other Interior Department contracts, 25 U.S.C. 47 mandates a preference for Indians generally, and the regulations implementing that provision specifically prohibit discrimination based on tribal affiliation. 48 C.F.R. 1452.204-71(a). Regulations of the Office of Federal Contract Compliance also provide that a federal contractor who gives a preference to Indians for employment on or near a reservation is not in violation of the equal employment opportunity clause of its contract so long as such a preference does not discriminate on the basis of tribal affiliation. 41 C.F.R. 60-1.5(6).

The Indian preference policy is intended, in part, to give Indians greater participation in their own self-government and to reduce the negative effect of having non-Indians administer matters that affect tribal life. *Morton* v. *Mancari*, 417 U.S. 535, 541-542 (1974). These preferences tend to increase the number of nonmember Indians residing on Indian reservations. A ruling that many of the persons drawn to the reservation by the Indian preference policy are immune from tribal criminal law would tend to undermine the efficacy of this policy in promoting tribal self-government.

[41] Although most such resident aliens can, unlike petitioner, anticipate that at some point they can be admitted to citizenship, the requirement of compliance with the local law is not dependent on that anticipation. Thus, persons in this country on student visas or on special work permits may never become eligible for citizenship, but are nevertheless subject to our laws and their enforcement processes.

This Court has repeatedly recognized that the federal government may pass laws treating Indians differently from non-Indians, and that those laws do not constitute discrimination based on race, but are based on the peculiar historical and legal relationship between the United States and the Indian tribes.[42] Tribal jurisdiction over nonmember Indians reflects the patterns in 18 U.S.C. 1151-1153 and likewise does not constitute invidious racial discrimination.

In *Morton* v. *Mancari*, *supra*, non-Indian employees of the Bureau of Indian Affairs challenged the employment preference for Indians in the Bureau pursuant to Section 1 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461). This Court upheld the preference as violating neither the Equal Employment Opportunity Act of 1972 nor the Due Process Clause of the Fifth Amendment. The Court stated, 417 U.S. at 554 (footnote omitted):

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. * * * In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.

Significantly, the Court in *Mancari* approved the preference for any enrolled member of an Indian tribe, regardless of particular tribal membership, for BIA employment with his own tribe or another. The decision thus stands for the proposition that it is proper for relevant purposes to treat tribal Indians as a group differently from other persons, and that it is not necessary

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[42] See *Williams* v. *Lee*, 358 U.S. 217, 219 n. 4 (citations omitted): "The Federal Government's power over Indians is derived from Art. I, § 8, cl. 3, of the United States Constitution, and from the necessity of giving uniform protection to a dependent people."

that distinctions be drawn on the basis of membership in the particular tribe that is specifically involved.

Similarly, in *Antelope*, 430 U.S. at 646-647 & n.7, this Court observed that 18 U.S.C. 1151 and 1153 apply to enrolled tribal members, not simply to members of the "Indian race"; they are accordingly "based neither in whole nor in part upon impermissible racial classifications." That rationale fully applies here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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